

## Returning Majesty To The Law and Politics: A Modern Approach\*

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Even after participating in many different aspects of the practice of law, it is still possible to retain an enthusiasm and love for the law and its practice. It is also exciting to address future lawyers about the practice of law. This is not easy to do, unfortunately, in the context of recurring public criticism about the judicial process.<sup>1</sup>

The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. But what is "correct" is often difficult to discern when the law is attempting to balance competing interests and principles, such as the need to protect society from drugs as opposed to the need to enforce our constitutional right to be free from illegal searches and seizures.<sup>2</sup> A con-

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1. See, e.g., Katharine Q. Seelye, *Dole, Citing 'Crisis' in the Courts, Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996, at A1 (describing Senator Dole's criticism of liberal ideology of Clinton judicial appointments and American Bar Association); John Stossel, *Protect Us From Legal Vultures*, WALL ST. J., Jan. 2, 1996, at 8 (asserting damage manufacturers have done to society is "trivial" compared with harm lawyers do); Don Van Natta Jr., *Group Urges More Scrutiny For Lawyers*, N.Y. TIMES, Nov. 10, 1995, at B1 (discussing recommendations for improving legal system and combatting public criticism by Committee on the Profession and the Courts assembled by New York State's highest court).

2. See generally 5 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH

fused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.<sup>3</sup>

Unfortunately, lawyers themselves sometimes feed that cynicism by joining a chorus of critics of the system, instead of helping to reform it or helping the public to understand the conflicting factual claims and legal principles involved in particular cases.<sup>4</sup> Similarly, instead of attempting to control criminal or unethical conduct occurring in our profession and promoting the honorable work of most of us, many lawyers respond by denigrating the professionals in certain practice areas, like personal injury law. Further, many neglect to focus on the core issues that rightly trouble the public, such as whether there is fraud and deceit in the prosecution of claims, and if so, what we should do about it.

Today, we will discuss how we can satisfy societal expectations about "The Law" and help create a better atmosphere in which public officials, and especially lawyers and judges, can inspire more confidence and respect for the "majesty of the law" and for the people whose professional lives are devoted to it.

## I. THE LAW AS A DYNAMIC SYSTEM

The law that lawyers practice and judges declare is not a definitive, capital "L" law that many would like to think exists. In his classic work, *Law and the Modern Mind*, Jerome Frank aptly summarized the paradox existing in society's attitude toward law and its practitioners:

The lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its most vital problems, yet concurrently it sneers at them as tricksters and quibblers.

Respect for the bar is not difficult to explain. Justice, the protection of life, the sanctity of property, the direction of social control—these fundamentals are the business of the law and of its ministers, the lawyers. . . .

But coupled with a deference towards their function there is cynical disdain of the lawyers themselves. . . . The layman, despite the fact that

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AMENDMENT (3d ed. 1996) (explaining that exclusionary rule protects constitutional right to be secure against unreasonable searches and seizures).

3. See *Judge Baer's Mess*, N.Y. TIMES, Apr. 3, 1996, at A14 (criticizing federal judge's reversal of initial exclusion of drugs and confession as unconstitutional seizure). According to one editorial, "[o]ne of the major troubles with most lawyers is that they actually believe their profession is making the United States a better place to live." *Time For Real Legal Reform Is Now, Before Lawyers Bring Nation Down, Series: The Trouble with Lawyers*, FT. LAUDERDALE SUN-SENTINEL, Jan. 4, 1996, at 14A.

4. See Max Boot, *Stop Appeasing the Class Action Monster*, WALL ST. J., May 8, 1996, at A15 (detailing how corporate mass-tort defense lawyers criticize class actions yet offer few alternatives or solutions).

he constantly calls upon lawyers for advice on innumerable questions, public and domestic, regards lawyers as equivocators, artists in double-dealing, masters of chicane.<sup>5</sup>

Frank, a noted judge of the Court of Appeals for the Second Circuit and a founder of the school of "Legal Realism," postulated that the public's distrust of lawyers arises because the law is "uncertain, indefinite, [and] subject to incalculable changes," while the public instead needs and wants certainty and clarity from the law.<sup>6</sup> Because a lawyer's work entails changing factual patterns presented within a continually evolving legal structure, it appears to the public that lawyers obfuscate and distort what should be clear. Frank, however, pointed out that the very nature of our common law is based upon the lack of certainty:

The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. *Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.*<sup>7</sup>

Frank believed that in the complex, fast-paced modern era, lawyers do themselves a disservice by acceding to the public myth that law can be certain and stable. He advocated that lawyers themselves accept the premise that the law is not fixed and that change in the law is inevitable and to be welcomed: "Without abating our insistence that the lawyers do the best they can, we can then manfully [sic] endure inevitable short-comings, errors and inconsistencies in the administration of justice because we can realize that perfection is not possible."<sup>8</sup>

Frank's thesis, set forth in 1930, should continue to attract examination today. It supports a pride that lawyers can take in what they do and how they do it. The law can change its direction entirely, as when *Brown v. Board of Education*<sup>9</sup> overturned *Plessy v. Ferguson*,<sup>10</sup> or as the common law has gradually done by altering the standards of products liability law directly contrary to the originally restricted view that instructed "caveat

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5. JEROME FRANK, LAW AND THE MODERN MIND 3 (Anchor Books 1963) (1930).

6. *Id.* at 5. In the preface to the sixth printing of LAW AND THE MODERN MIND, Frank took issue with the notion that his theories and their advocates constituted a school. *Id.* at viii-xii. Instead, Frank preferred to be viewed as a "factual realist" or as he described himself, a "fact skeptic," as opposed to a "rule skeptic." *Id.* at xii.

7. *Id.* at 6-7 (footnotes omitted).

8. *Id.* at 277.

9. 347 U.S. 483 (1954).

10. 163 U.S. 537 (1896).

emtor.”<sup>11</sup> As these cases show, change—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society.

Lawyers must also continually explain the various reasons for the law’s unpredictability. First, as Frank describes, laws are written generally and then applied to different factual situations.<sup>12</sup> The facts of any given case may not be within the contemplation of the original law.<sup>13</sup> Second, many laws as written give rise to more than one interpretation (or, as happens among the circuit courts, differing or even majority and minority views).<sup>14</sup> Third, a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction.<sup>15</sup> Fourth, the function of the law at a trial is not simply to provide a framework within which to search for the truth, as understood by the public, but it is to do so in a way that protects constitutional rights.<sup>16</sup> Against these and other constraints, including, as Frank observed, an unknown factor—i.e., which version of the facts a judge or jury will credit—competent lawyers are often unable to predict reliably what the outcome of a particular case will be for their clients.<sup>17</sup>

11. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 95-96, at 677-83 (5th ed. 1984) (outlining movement from notion of caveat emptor to liability for losses caused by defective products); RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965) (detailing common law evolution of liability for defective products).

12. See FRANK, *supra* note 5, at xii (describing how courts apply legal rules to unique cases).

13. See *id.* at 127-28 (criticizing mechanistic approach to law that would treat people like mathematical entities to achieve predictability).

14. See *id.* at 121 (discussing statistical evidence concerning differences among judges).

15. Cf. Jeremy Paul, *First Principles*, 25 CONN. L. REV. 923, 936 (1993) (discussing how cases of first impression force judges to create law and affect law’s unpredictability).

16. See *United States v. Filani*, 74 F.3d 378, 383-84 (2d Cir. 1996) (discussing varied goals of the trial in American jurisprudence). In *Filani*, the United States Court of Appeals for the Second Circuit considered a drug conviction based on the judge’s improper questioning of the defendant. *Id.* at 382-83. In discussing the history and role of trial judges in England and the United States, the court stated:

One of the reasons for allowing an English judge greater latitude to interrogate witnesses is that a British trial, so it is said, is a search for the truth. In our jurisprudence a search for the truth is only one of the trial’s goals; other important values—individual freedom being a good example—are served by an attorney insisting on preserving the accused’s right to remain silent or by objecting to incriminating evidence seized in violation of an accused’s Fourth Amendment rights. The successful assertion of these rights does not aid—and may actually impede—the search for truth.

*Id.* at 384.

17. FRANK, *supra* note 5, at xiv-xv. Of course, there are many instances in which lawyers can predict reliably what the outcome of a particular case will be. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 83-86 (1995) (analyzing systemic pressures to plea bargain in criminal cases). Cases that reach the trial stage do not reflect the multitude of cases that are resolved early—even before the complaint stage—precisely because the parties have quite a clear expectation of how their cases would be decided. See *id.* at 83

This necessary state of flux, as well as our reliance on the adversary system, give rise to a cynicism expressed by Benjamin Franklin in the mid-seventeen hundreds, but equally reflective of the public mood today:

I know you lawyers can with ease  
Twist words and meanings as you please;  
That language, by your skill made pliant,  
Will bend, to favor every client;  
That 'tis the fee limits the sense  
To make out either side's pretense,  
When you peruse the clearest case,  
You see it with a double face. . . .  
Hence is the Bar with fees supplied;—  
Hence eloquence takes either side. . . .  
And now we're well secured by law,  
*Till the next brother find a flaw.*<sup>18</sup>

This image raises perhaps the greatest fear about the role of law and lawyers: that on the same facts, and presented with the same law, two judges or juries would reach different results in the same case because of a lawyer's presentation.<sup>19</sup> Whether the concern is that only the wealthy can afford the best lawyers, or simply that the more "eloquent" attorney can get a better result, it is an intimidating possibility to a public that seeks certainty and justice from the law. From the vantage of a judge, however, it is not a correct or complete picture of what happens in the courtroom. To the extent judges and juries reach different results, much, as Frank observed, may be attributable to the fact that judges and juries react differently to facts because their life experiences are different.<sup>20</sup> Working from the same facts and within the confines of the same law, however, it seems that gross disparities in result do not frequently occur.<sup>21</sup> But the law does evolve, and to assist its evolution and at the same

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(noting some defendants readily admit guilt and acknowledge responsibility for wrongs committed).

18. Benjamin Franklin, *Poor Richard's Opinion*, in *LAW: A TREASURY OF ART AND LITERATURE* 151, 151 (Sara Robbins ed., 1990).

19. Compare *BMW v. Gore*, 116 S. Ct. 1589, 1592-94 (1996) (considering constitutionality of \$2 million punitive damages award for undisclosed automobile paint repairs), with *Yates v. BMW*, 642 So. 2d 937, 938 (Ala. Civ. App. 1993) (noting jury in virtually identical Alabama fraudulent car repainting lawsuit awarded no punitive damages), *cert. quashed as improvidently granted* by 642 So. 2d 937 (Ala. 1993).

20. See FRANK, *supra* note 5, at xii-xiii (recognizing judge and juries bring personal prejudices to trials). In extreme cases, of course, a lawyer (or a judge or jury) can be entirely incompetent or otherwise entirely fail to do a proper job.

21. This conclusion is based both on personal experience as a judge and on the statistically small number of jury verdicts set aside or new trials ordered by judges. Of course, case law principles require that appellate courts give jury verdicts a great deal of deference. See *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2336-38 (1994) (stating civil jury verdicts are historically afforded deference on judicial review unless damages too large); *United States v. Powell*, 469 U.S. 57, 67 (1984) (commenting

time maintain their own credibility, lawyers must dispel the view that they are dishonest, dissembling, hypocritical, or that Ben Franklin's description is correctly derisive.<sup>22</sup>

Frank's point that the public fails to appreciate the importance of indefiniteness in the law must be addressed through better education of the public by lawyers and others, including government officials.<sup>23</sup> In addition, the public has other needs relating to the law: the need, for example, for lawyers to act honorably, beyond what any law, regulation, or professional rule may require. This need requires a different response.

## II. MORALITY IN PUBLIC SERVICE

What are our expectations of lawyers, judges, and of public servants generally? Over the years, the response to scandal and disappointment in lawyers and in our public officials has varied. A history of ethical codes that have apparently not provided sufficient guidance to practitioners has recently led to tighter restrictions. In the public sphere, we have for some time been engaged in passing laws and regulations intended to curb unworthy behavior. This may not always be adequate for public officials or for lawyers. Some would argue that reliance on regulations alone defuses the notion of personal responsibility and accountability.

Charles Dickens on a visit to the United States in the nineteenth century described his sorrow when confronted with the American approach to regulating gifts to public servants:

The Post Office is a very compact and very beautiful building. In one of the departments, among a collection of rare and curious articles, are deposited the presents which have been made from time to time to the American ambassadors at foreign courts by the various potentates to whom they were the accredited agents of the Republic; gifts which by the law they are not permitted to retain. I confess that I looked upon this as a very painful exhibition, and one by no means flattering to the national standard of honesty and honour. That can scarcely be a high state of moral feeling which imagines a gentleman of repute and station likely to be corrupted, in the discharge of his duty, by the present of a snuff-box, or a richly-mounted sword, or an Eastern shawl; and surely the Nation who reposes confidence in her appointed servants, is likely to be better served, than she who makes them the subject of such very mean

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that deference to jury's collective judgment brings element of finality to criminal process); *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 201-02 (2d Cir. 1995) (finding appellate court grants "strong presumption of correctness" when reviewing whether jury verdict is "seriously erroneous").

22. Franklin, *supra* note 18, at 151.

23. See Roberta Cooper Ramo, *Law Day More Important than Ever for Keeping Strong*, CHI. DAILY L. BULL., Apr. 27, 1996, at 8 (emphasizing importance of legal profession keeping citizenry well informed about Constitution and legal system).

and paltry suspicions.<sup>24</sup>

There is indeed a national plethora of legislation at every level of government restricting activities of government officials.<sup>25</sup> This legislation, among other things, controls the receipt of gifts; limits outside employment and the amounts of fees and honoraria; restricts post-employment contact with government; curbs the extent of political activities; requires the acceptance of the lowest (but not necessarily best) bids on government contracts; and sets prohibitions on the manner and ways in which to address financial and other conflicts. These rules are extremely important, even vital, notwithstanding Dickens' eloquent statement to the contrary. They protect the public from many kinds of inappropriate influences on government officials, and they perform another crucial service in providing guidance to and protecting those they regulate. Public servants have sometimes walked a fine line or walked over the line between gifts and bribes.<sup>26</sup> If specific rules have their place, however, that does not mean that we should limit the standard we apply to public officials to the technical question whether those rules have been broken, rather than aspiring to the highest in moral behavior. As a "Nation," we have not sufficiently emphasized the importance of professional morality in public service, whether among our government officials or our lawyers. Instead, we over-emphasize social morality, concentrating on personal scandals that we cannot regulate, and then pass detailed rules, hoping to elevate professional behavior in that way. If we limit our expectations to what is specifically regulated (and sometimes over-regulated), we may in effect degrade the offices and the people who hold them.

In other countries, professional morality is approached differently. In Europe, for example, public officials often have greater discretion, are better paid, and are held to higher standards of behavior, in some instances resigning their office if there is the hint of financial scandal in their work.<sup>27</sup>

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24. CHARLES DICKENS, *AMERICAN NOTES AND PICTURES FROM ITALY* 123 (Oxford Univ. Press 1957) (1842). It is interesting that in England there is now a heightened sense that laws or rules are in fact needed to regulate the behavior of public officials. See COMMITTEE ON STANDARDS IN PUBLIC LIFE, FIRST REPORT, 1995, Cmnd 2850-I, at 3 (urging remedial legislative action to counter public discontent with ethical standards of public officials).

25. See generally COUNCIL ON GOVERNMENTAL ETHICS LAWS, THE COUNCIL OF STATE GOV'TS, COGEL BLUE BOOK (9th ed. 1993) (compiling information on laws governing campaign finance, ethics, lobbying and judicial conduct nationwide).

26. See Jane Fritsch, *The Envelope, Please: A Bribe's Not a Bribe When It's a Donation*, N.Y. TIMES, Jan. 28, 1996, at D1 (describing subtle distinction between illegal bribes and legal campaign contributions to politicians); Stephen Kurkjian, *Ferber's Conviction Spurs Widening of Probe*, BOSTON GLOBE, Aug. 15, 1996, at B5 (reporting planned investigation of Massachusetts politicians after corruption conviction of former financial advisor to state agencies).

27. See generally Mark Davies, *The Public Administrative Law Context of Ethics Requirements*

The tolerance in this country for questionable behavior by public officials is illustrated by the persistence of extremely troubling—but legal—practices in the public arena. In one of the murkiest and least well-controlled areas, we find ourselves debating what the quid pro quo's are for campaign contributions. Here we have abandoned standards we would surely apply in any other context. We would never condone private gifts to judges about to decide a case implicating the gift-givers' interests.<sup>28</sup> Yet our system of election financing permits extensive private, including corporate, financing of candidates' campaigns, raising again and again the question what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate.<sup>29</sup> Can elected officials say with credibility that they are carrying out the mandate of a "democratic" society, representing only the general public good, when private money plays such a large role in their campaigns? If they cannot, the public must demand a change in the role of private money or find other ways, such as through strict, well-enforced regulation, to ensure that politicians are not inappropriately influenced in their legislative or executive decision-making by the interests that give them contributions.<sup>30</sup> As Congress revamps many questionable practices, including the receipt of gifts from lobbyists, it must monitor to the public's satisfaction both whether inappropriate activity is being left unregulated and whether laws and regulations that are put in place are actually enforced. The continued failure to do this has greatly damaged public trust in officials and exacerbated the public's sense that no higher morality is in place by which public officials measure their conduct.

Similarly, the public wonders whether lawyers have enforceable rules of self-government or any kind of defined professional morality. Professional codes tend to speak in terms of ethical presumptions, without prescribing what lawyers should do in specific, troubling situations. For example, almost all professional codes require that a lawyer should represent a client zealously within the bounds of the law and may not suborn perjury or the creation of false documents.<sup>31</sup> But no rule guides a lawyer who is

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for *West German and American Public Officials: A Comparative Analysis*, 18 GA. J. INT'L & COMP. L. 319 (1988) (detailing differences between ethics regulations for American and German public officials).

28. Cf. Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 194 (1996) (discussing Texas attorney Joe Jemail's \$10,000 campaign contribution to judge in Texaco-Pennzoil case).

29. See Fritsch, *supra* note 26, at D1 (reporting influence of special interest money as serious political issue).

30. See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1160 (1994) (proposing replacement of federal election finance system with total public financing of congressional campaigns).

31. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1995) (noting candor toward tribu-



merely left with a firm and abiding conviction that what is being said or proffered by a witness or client is false. Rules might be ill-suited to answer such dilemmas, but moral imperatives, or what Lord Moulton described in 1924 as "Obedience to the Unenforceable," may be more helpful.<sup>32</sup>

Lord Moulton, to be sure a man of his time, spoke of Obedience to the Unenforceable as a standard that people live up to despite the fact that no law can force them to do so.<sup>33</sup> He gave as an example the conduct of the men aboard the Titanic who, facing imminent death, nevertheless adhered to the principle that women and children should be saved first:

Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good Manners. . . . The feeling of obedience to the Unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved.<sup>34</sup>

Our public officials and lawyers should also be prepared to adopt a culture that depends upon subjective accountability as well as on well-defined, consistent rules and regulations:

The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards.<sup>35</sup>

### III. THE BAR'S RESPONSIBILITY

What is the responsibility of a practicing lawyer, and how can lawyers' behavior be changed in ways to encourage greater respect for the legal profession? To take one example of a tolerated but unacceptable pattern, let us examine the lying and misrepresentation that occurs in court.

Some number of witnesses in court lie, including some for the prosecution and some for the defense, and their lawyers suspect as much. Lawyers are not, however, routinely confronted with the clear-cut dilemma

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nal prevents lawyer from offering false evidence); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, 7-6 (1983) (declaring lawyer's duties to client and legal system).

32. Lord Moulton, *Law and Manners*, ATLANTIC MONTHLY, July 1924, at 1, 1. Lord Moulton, a judge and member of the British Parliament, served as Minister of Munitions for Great Britain at the outbreak of World War I. *Id.*

33. *Id.*

34. *Id.* at 4.

35. PIERO CALAMANDREI, EULOGY OF JUDGES 45 (John Clarke Adams & C. Abbott Phillips, Jr. trans., 1942).

that a client proposes to "lie" on the stand. A client presents a version of the facts, and lawyers rarely have independent, first-hand knowledge of them. (In criminal cases, clients frequently choose not to take the stand, often on the advice of an attorney, advice that is given for any number of reasons, including the risk of presenting perjured testimony.) What more commonly occurs is that witnesses, often unconsciously, allow selectivity, prejudice, and emotion to color their perceptions. Even when two witnesses directly contradict one another, both may be "telling the truth" from their own points of view or to the best of their recollection. Real life is complex, and we have chosen to use the adversarial system to sort out the truth as best it can.<sup>36</sup>

To maintain credibility in the system, however, we must study how well we do in fact get at the "truth."<sup>37</sup> Lying is risky in the courtroom, but not generally because of the threat of a perjury indictment. It is risky because each side has the opportunity, through discovery, independent investigation, and cross-examination, to expose falsehood.<sup>38</sup> But the adversarial system may not always be wholly adequate to the task of exposing wrong-doing and false or inflated claims. Empirical studies have been performed, for example, that examine the reliability of witnesses and jurors.<sup>39</sup> Many factors influence witnesses and juries, including subconscious racism and other prejudices. As a profession, we should seek, based upon empirical evidence, ways in which to improve our ability to arrive at the truth. If we undertake this seriously, we will not only do well by the cause of justice, but we will justifiably improve the public's opinion of our profession.

The adversary system may also be ill-suited to resolve certain types of disputes such as those presented by "battles of the experts" in medical malpractice and many other kinds of cases. There is recurring debate about the ability of jurors to evaluate such evidence. The Supreme Court of the

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36. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 158-59 (1978) (analyzing how adversary system sometimes encourages attorneys to argue credibility of clients who have made knowingly perjurious statements).

37. See Marvin E. Frankel, *The Search for Truth—An Umpireal View*, 30 REC. ASS'N B. CITY N.Y. 14, 15 (1975) (arguing that the "adversary system rates truth too low among the values that institutions of justice are meant to serve.")

38. See FED. R. CIV. P. 26-37 (setting forth rules governing depositions and discovery in federal civil cases); FED. R. CRIM. P. 16 (establishing rules of evidentiary disclosure by both government and defendant in criminal cases); FED. R. EVID. 607 (allowing impeachment of witness' credibility).

39. See generally JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* (1987) (presenting social scientific research on jury behavior and persuasion); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988) (analyzing jury reliability and phases of jury trial); Christopher M. Walters, Note, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985) (discussing expert witness reliability in eyewitness identification cases).

United States, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>40</sup> has reacted to this debate by expanding the judge's function to require that scientific testimony be evaluated more stringently before it can be presented to a jury.<sup>41</sup> Certainly, the battle of the experts undermines public confidence not only in the certainty of the law, but in another desired bedrock, the certainty of science. We must revisit whether other methods of inquiry into specialized areas—such as the use of court-appointed experts or Special Masters who share their conclusions with juries—may be more useful to resolve these kinds of disputes. The current system, in this particular respect, should somehow be made to work better or should be critically evaluated, and if necessary, replaced.

Finally, the adversary system, almost by definition, cannot address the gray area of the “truth” present in most cases because the system tends to produce all-or-nothing winners and losers. This is why settlements and new forms of “alternative dispute resolution” are so important.<sup>42</sup> Dickens' remark that honorable lawyers admonish their clients to “[s]uffer any wrong that can be done you, rather than come here [to the courts],” is still timely for many litigants.<sup>43</sup> The adversary system has its limitations under the best of circumstances, including the limitations it places on the judges' role, and so we must explain why the benefits of the system outweigh those limitations.<sup>44</sup> If, as has been said of the democratic form of government, the adversary system is “the worst . . . except [for] all those other forms,” then that is the way in which the public should understand it: not as a system expected to accomplish more than any system can.<sup>45</sup>

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40. 509 U.S. 579 (1993).

41. See *id.* at 597 (acknowledging Federal Rules of Evidence require judge to ensure scientifically valid principles support expert testimony).

42. See Abraham Lincoln, Notes for a Law Lecture, in THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 302 (Fred R. Shapiro ed., 1993) (“As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”); Joshua A. Darrell, *For Many, Litigation Retains Important Practical Benefits*, NAT'L L. J., Apr. 11, 1994, at C11 (discussing benefits of alternative dispute resolution).

43. CHARLES DICKENS, BLEAK HOUSE 51 (Norman Page ed., Penguin Books 1971) (1853) (quotation marks omitted).

44. Judges sometimes receive criticism if they ask, or let juries ask, too many questions of witnesses. See *United States v. Filani*, 74 F.3d 378, 384 (2d Cir. 1996) (commenting on popular notion that limited questioning by trial judge guards against bias); *United States v. Ajmal*, 67 F.3d 12, 14-15 (2d Cir. 1995) (discussing dangers of prejudice and compromise of juror neutrality in juror questioning of witnesses); see also Bill Alden, *Juror Inquiries Require Retrial for Defendant*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting how improper juror questioning in *Ajmal* case led to reversal and new trial). In today's media-dominated world, jurors are more informed about legal issues than ever before. More explanation by judges why certain legal principles are important or why certain evidentiary rulings have been made may be helpful to contain speculation that can lead juries astray. Similarly, if jurors ask questions that seek to clarify evidence, and if the practice is properly controlled, this may preserve rather than interfere with a jury's impartiality.

45. Winston Churchill, Speech (Nov. 11, 1947), in THE OXFORD DICTIONARY OF QUOTATIONS 202 (Angela Partington ed., 4th ed. 1992).

As we ponder how effective our legal system is, we must help create greater credibility in existing, useful mechanisms. A number of years ago, Judge Harold Rothwax of the Supreme Court of the State of New York noted his concern that illegal activities occur in the judicial system sometimes for years and that lawyers do not report them.<sup>46</sup> In a heartening exception to this generalization, insurance kick-backs were recently exposed by a lawyer who was offered one in New York.<sup>47</sup> Similarly, we recently have heard much about the police practice of tailoring testimony to avoid the suppression of evidence, an apparently common practice that must be known to, or at least suspected by, some prosecuting attorneys.<sup>48</sup> Often, however, lawyers, instead of engaging in genuinely useful projects to ferret out fraud, tend to denigrate either the law itself or the role and quality of work performed by lawyers in the fields, for example, of personal injury or criminal defense. Lawyers have also unfortunately joined the public outcry over excessive verdicts and seemingly ridiculous results reached in some cases.<sup>49</sup>

The response that can give the public confidence in our profession is our own leadership in weeding out the fraudulent and wrongful conduct that the public rightly condemns at the same time as we challenge overreactions that undermine the principles of our judicial system.<sup>50</sup> For example, legislators have introduced bills that place arbitrary limits on jury verdicts in personal injury cases.<sup>51</sup> But to do this is inconsistent with the premise of the jury system. The focus must be shifted back to monitoring frivolous claims, uncovering pervasive misrepresentation in court, and educating the public that no system of justice is perfect. Despite occasional disappointing results, our system does have mechanisms in place that moderate jury verdicts (such as judges' discretion to set aside or reduce unreasonable verdicts), that allow for the discipline of lawyers, and

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46. See *Symposium: Ethics in Government*, CITY ALMANAC, Winter 1987, at 20, 20 (noting corruption in legal system succeeds when a few good people do nothing).

47. See Matthew Goldstein, *23 Lawyers Arrested in Insurance Scheme: Inflating of Settlements in Tort Cases Charged*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting praise of whistleblowing attorney who stated he "did what any honest citizen would do"); George James, *47 Accused in an Insurance Claim Scheme*, N.Y. TIMES, Sept. 22, 1995, at B3 (describing district attorney's praise of lawyer as "credit to the legal profession and the general public").

48. See *And What About Justice?*, WALL. ST. J., Sept. 1, 1995, at A6 (discussing perjury by law enforcement officers in O.J. Simpson trial and on Philadelphia police force); see also HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 63-65 (1996) (discussing problems exclusionary rule creates for law enforcement officers).

49. See *Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A14 (publishing attorney's criticism of criminal trials as "indistinguishable from Roman circuses").

50. Cf. *supra* note 47 and accompanying text (describing efforts of New York attorney exposing fraudulent practices by plaintiffs' personal injury attorneys).

51. See Common Sense Product Liability Legal Reform Act of 1996, H.R. 481, 104th Cong. (limiting punitive damages in certain cases).

that can result in punishment of perjurers.<sup>52</sup>

Criminal law is the most challenging arena in which to satisfy the public that our system adequately addresses problems of apparently wrong verdicts. This is largely because the public either does not understand or does not accept the necessity for safeguards against sometimes overzealous prosecution and the protection of certain civil liberties. The role of criminal defense lawyers in particular is not well understood or sufficiently appreciated by many lawyers, much less the public. Prosecutors and government officials should be especially sensitive to and publicly supportive of the fundamental place constitutional safeguards and the defense bar have in our system. We must take an aggressive role in cleaning our own house by educating ourselves and publicly supporting our colleagues who perform essential functions in asserting and protecting constitutional rights.<sup>53</sup>

If we can persuade the public that the system we have in place and the roles played by lawyers within that system are the best available, there remain ancillary issues of an ethical nature that do not necessarily involve what happens in the courtroom. We have an obligation, for example, to address professional conduct perceived by the public to be wrong even if it is not necessarily illegal. For example, in New York State, a recent study of the matrimonial bar concluded that a very significant negative sense exists of matrimonial practice, based on the perception that matrimonial lawyers often take unfair financial advantage of emotionally fragile clients.<sup>54</sup> Similarly, California found that sexual exploitation of clients

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52. See *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2214 (1996) (applying New York check on excessive damages to federal court); *Bender v. City of New York*, 78 F.3d 787, 794-95 (2d Cir. 1996) (finding verdict of \$300,700 excessive in civil rights action); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993) (finding \$1.5 million verdict for pain and suffering excessive); see also 18 U.S.C. §§ 401-02 (1994) (granting courts power to punish contempt of courts' authority, including obstruction of justice); 18 U.S.C. § 1623 (1994) (criminalizing false declarations before any federal court or grand jury); FED. R. CIV. P. 11(c) (providing for sanctions of lawyers who pursue frivolous claims and needless litigation); *Dunn v. United States*, 442 U.S. 100, 107 (1979) (noting Congress enacted § 1623 to "facilitate perjury prosecutions and thereby enhance the reliability of testimony"). Perjury cases are not often pursued, and perhaps should be given greater consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.

53. See *Miranda v. Arizona*, 384 U.S. 436, 480 (1966) (noting attorney carries out sworn duty by advising client to remain silent during police questioning). The *Miranda* Court emphasized that an attorney's advice of silence in the face of criminal investigation is an exercise of "good professional judgment," not a reason "for considering the attorney a menace to law enforcement." *Id.*; see also *United States v. Filani*, 74 F.3d 378, 384 (2d Cir. 1996) (noting that "fulfilling professional responsibilities 'of necessity may become an obstacle to truthfinding.'" (quoting *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting))).

54. See COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS, ADMINISTRATIVE BD. OF THE COURTS OF N.Y., REPORT 1-5 (1993) (identifying criticism of divorce law system and proposing reforms and improvements for lawyers and courts); see also *Carpe Diem*, N.Y. L.J., Mar. 12, 1993, at 2 (citing report critical of divorce lawyers by New York City Department of Con-

was a pervasive enough problem in divorce and other areas of legal practice that the California Supreme Court passed a very hotly debated professional rule setting forth a lawyer's professional obligations in these situations.<sup>55</sup>

Whether the rule will have an effect in California on the public's perception of lawyers depends largely on how vigilantly their colleagues and others hold lawyers to the rule: Will lawyers actually be reported to the bar association when they are suspected of having inappropriate sexual relations with a client? How aggressively will they be investigated? And will they be held accountable if they continue to represent a client with whom they are having an impermissible sexual relationship?

Failure to enforce such a rule will again feed the public's mistrust, which arises in part from the sense that lawyers (and public officials), whose conduct is generally self-policed, protect themselves from proper regulation. In New York, disciplinary proceedings have until recently been closed to protect lawyers from unjust criticism and harm to their reputations. Despite a recommendation by its Task Force on the Profession that these proceedings be made public, the House of Delegates of the New York State Bar Association has opposed the measure.<sup>56</sup> Unquestionably, unjust criticism of a professional can be devastating. But it is worth examining whether that concern is better addressed by creating a quick, fair process for determining whether a charge is unfounded than by continuing a practice of not airing complaints publicly.<sup>57</sup> Alternatively, we must find other ways to assure the public that closed proceedings are effective in disciplining lawyers, and we must do more to monitor them. One way or another, there must be convincing public justification for the manner in which discipline and performance are regulated.

In the political sphere, the sense that elected officials fail to police themselves is equally prevalent. Partisanship is the accepted "adversarial" mechanism that is supposed to maintain checks and balances and protect the public in various contexts, including in the fields of elections and campaign finance.<sup>58</sup> Bipartisan commissions, such as boards of elections

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sumer Affairs commissioner).

55. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-120 (1995) (prohibiting lawyer from engaging in sexual relations with a client in specific circumstances).

56. See Gary Spencer, *State Bar Opposes Any Public Discipline Procedures*, N.Y. L.J., June 27, 1995, at 1 (reporting bar association refused to endorse "even the smallest step toward opening" disciplinary process to public). The Association of the Bar of the City of New York has endorsed opening up these proceedings. See Committee on Professional Discipline, *The Confidentiality of Disciplinary Proceedings*, 47 REC. ASS'N B. CITY N.Y. 48, 60 (1992) (advocating opening process to public after determination that proceedings should begin).

57. Arguably, lawyers do not exhibit the same heightened sensitivity to the plight their clients suffer when unfair or embarrassing information becomes public through legal proceedings.

58. The Federal Election Commission is, for example, bipartisan by law. See 2 U.S.C. §

or most campaign finance agencies, often reflect a close relationship between commissioners and party politics. The result is often votes on individual matters along party lines rather than on the merits, and policies and procedures that favor the established parties over independent or alternative groups. By contrast, the experience of New York City's Campaign Finance Board—a pioneer agency regulating New York City's program of optional public financing of political campaigns—has been that of a deliberative, non-partisan board that nearly always acts unanimously and certainly always without regard to party affiliation. The non-partisan culture of that board is a model for decision-making in the political sphere. But few legislatures—including the federal Congress—are prepared to have their campaign finances monitored by a genuinely non-partisan, objective body. As a result, regulation of activity which is vital to the health of our democracy—including campaign finance activity—is largely administered by bipartisan agencies with weak claim to the public's trust.<sup>59</sup> The legislators' failure to submit themselves to meaningful scrutiny heightens cynicism about our elected officials, many of whom, as we all know, are lawyers.

In short, we must find ways to re-evaluate and, if necessary, alter our methods of concluding legal and political conflicts. Next, we must find effective, confidence-building mechanisms for policing ourselves. Further, we must be prepared to entrust judgments on our own professional fitness not only to our colleagues, but to the public.

#### IV. THE RESPONSIBILITY OF OTHERS

The changing nature of the law and the conduct of lawyers give the public understandable pause. We must not, however, fall prey to the public's cynicism. We must instead expect more of our profession. There is a limit to how far an individual lawyer can elevate the bar as a whole. What a lawyer can do, as argued above, is educate the public—at the very least in the person of his or her clients—and personally raise standards by living up to a code of conduct beyond what is "enforceable." This responsibility is not confined to attorneys in private practice. The others who operate in or around the legal framework—judges, prosecutors, juries, witnesses, public officials, and the press—must also educate themselves, and others, and apply higher standards of conduct to their own behavior.

Much distrust arises from a lack of understanding, whether about the

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437c(a)(1) (1994) (providing that only three of six members appointed to Commission "may be affiliated with the same political party").

59. See Charisse Jones, *Old-Style Board Faulted After Botched Voting*, N.Y. TIMES, Oct. 12, 1996, at 25 (reporting criticism of local bipartisan board of elections as "mismanaged" and "crippled" by political appointments).

purpose and role of the adversary system, the presumption of innocence, the right of every party to be represented by an attorney, or the facts and proceedings of a specific case—even a case as highly publicized as the O.J. Simpson trial. The limitations of the law are also poorly understood. We need the help of the schools, our media, and our public officials to communicate the values and limitations of our system of justice and to free us from simplistic analysis that breeds contempt.

What we should also acknowledge, to broaden the true reach of the law's majesty, is the role that many influences, including the press and the lay public, play in contributing to our intricate legal system.

## V. CONCLUSION

What we propose is as follows:

*First*, lawyers must make a greater effort at educating themselves, their clients, and the public about the key underpinnings of our legal system: the reasons for the law's uncertainty; the values and limitations of the adversary system; and the importance of respecting every kind of legal practice and the role it plays in helping our society to achieve its goals.

*Second*, we must re-examine what does and does not work to bring about justice and consider whether we can improve aspects of our system. Is the adversary process the best way of determining whether witnesses are telling the truth or for dealing with the "battle of the experts"? If not, let us improve what we have, or find a better way, recognizing that we cannot achieve perfection.

*Third*, we must instill among ourselves and our public officials a culture of a high morality, as best we can. We must determine what ethical guidelines are appropriate and then enforce them seriously. We must adopt concrete ways to recognize those among us who practice law and serve the public at the highest moral levels. We must combine to act more honorably both within our own sphere and collectively as a profession, supporting each other in the inevitable controversies that arise when lawyers and government officials properly carry out responsibilities that are ill understood by the public.

*Finally*, we must enlist not only every group of our profession, including judges, lawyers, legislators, and other public officials, to adhere to higher standards. We must also enlist clients, jurors, journalists, and all our fellow citizens, because we are all touched by the law, and we can all have an influence on how it evolves.

We cannot delay in addressing these moral issues of professional and political conduct. We are faced with on-going instances of erosion in public confidence. The O.J. Simpson trial and the constantly recurring investigations of public officials continue to subject our profession and government officials to public scorn and ridicule. The response, if we do not act,



will be an increasing amount of legislation criminalizing and otherwise regulating conduct and a demoralization in the practice of law and public service. We are losing many fine elected officials to retirement who no longer care to operate in a bitterly partisan and hostile atmosphere governed by few meaningful rules of conduct and subject to heightened and unrelenting personal scrutiny by the press. Among our own ranks, senior practitioners complain bitterly of the loss even of professional courtesy among lawyers and office holders.

In Boston, lawyers call their adversaries “brother” or “sister” in court. Anyone who experiences the practice appreciates the grace it adds to the proceedings. This grace is created by the aura of respect the titles seek to convey. In light of the increasing call by lawyers to return to greater professional civility, it is clear we ourselves feel and regret the loss of professional courtesy and respect.<sup>60</sup> We must first give respect to each other and to the profession—in word and in deed—before we can expect the public to do so.

If we act in these areas, the public discourse, the behavior of our lawyers and public officials as well as their reputations, and, ultimately, confidence in our legal and political systems will be greatly enhanced.

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60. See Louis P. DiLorenzo, *Civility and Professionalism*, N.Y. ST. B.J., Jan. 1996, at 8, 8-10, 25 (exploring scope of decline in professionalism among attorneys, uncovering its cause, and suggesting possible solutions); see generally NEW YORK STATE BAR ASS'N, *CIVILITY IN LITIGATION: A VOLUNTARY COMMITMENT* (1995) (explaining suggested guidelines for behavior of all participants in litigation process).

